

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA,

- v. -

GILBERTO ESTRELLA,

Defendant.  
-----X

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: _____ DATE FILED: <u>March 18, 2015</u>
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ORDER  
1: 07 Cr. 01117 (PAC)

HONORABLE PAUL A. CROTTY, United States District Judge:

On February 14, 2008, Gilberto Estrella (“Mr. Estrella”) pled guilty to illegal reentry to the United States after being deported for committing an aggravated felony. He was sentenced on May 28, 2008 to a term of 36 months to be served consecutively to an 8 year term of imprisonment on unrelated New York State gun and drug charges. Mr. Estrella did not appeal his conviction or sentence.

On July 9, 2009, Mr. Estrella filed an application, pursuant to 28 U.S.C. § 2255, with the Second Circuit. On August 18, 2009, the Second Circuit directed that Mr. Estrella’s application (attached as exhibit “A”) be transferred to the U.S. District Court for the Southern District of New York and filed as a 2255 “motion for adjudication” by the District Court.<sup>1</sup> For reasons at present unknown, the Second Circuit’s Order was not promptly complied with. Pursuant to the Second Circuit’s Order, the Court now directs that the Clerk’s Office file Mr. Estrella’s application as a 2255 motion in 1:07 Cr. 1117 – PAC. The application is denied.

On December 11, 2014, Mr. Estrella filed a motion under 18 U.S.C. § 3582(c)(2) seeking a reduction in his sentence. This motion is denied, as well.

<sup>1</sup> Mr. Estrella also filed with the Second Circuit a pro se application for the appointment of counsel (attached as Exhibit B). On September 14, 2009, the Second Circuit transferred this application to the District Court. Upon consideration of the substance and merits of Mr. Estrella’s claims, as set forth in his 2255 application, the Court denies the application for the appointment of counsel.

Mr. Estrella's 2255 application is really a request that his federal custodial sentence run concurrently with his state sentence, rather than consecutive to it:

"I am currently incarcerated at Gouverneur C.F., located in Gouverneur, New York, and have already cop-ed [sic] out to a 3 year sentence with the Federal Gouvernment [sic], that is to run consecutive to/after my State time is completed, in a few years.

I am challenging that sentence, as I do want to be deported, and feel it is harsh & ridig [sic] to run the time consecutively, and not concurrent with my existing sentence. I have currently completed "all" state programs, and even the drug ASAT drug program, and do have a place to live in the Dominican Republic.

I thank you for your help and assistance as my english is weak, and I will need a spanish lawyer assistance, as now I am going to our law library."

Mr. Estrella does not assert or claim any substantive or procedural error with his sentence. But since his State sentence was to be satisfied in 2013, he wishes to return to the Dominican Republic at that time, rather than serve his federal sentence. That is the sole reason he seeks a concurrent sentence.

Before he was sentenced, Mr. Estrella received the PSR, dated May 15, 2008. His PSR determined that the offense level was 21; and in light of his long criminal record, he was in criminal history Category IV. At the time of his arrest, he had 42 kilograms of cocaine, \$347,000 in cash, a .380 firearm, ammunition, a money counter and narcotics ledgers and records. He was sentenced to a state term of 8 years for this criminal conduct (2 years on the gun charge and 6 years on the drug and money laundering charges). The PSR calculated that the guidelines called for a sentence of 57 to 71 months;<sup>2</sup> and recommended a sentence of "71 months to run consecutively to the undischarged term of New York State imprisonment."

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<sup>2</sup> Before he pled guilty on February 14, 2008, Mr. Estrella and his counsel received a Pimental letter in which the Government calculated the Guidelines range at 46 to 57 months. The PSR determined that Mr. Estrella was on supervised release at the time of his illegal reentry and, accordingly, increased his crime history score.

The Pre-Sentence Report stated that the total custodial sentence for the State offenses was six years. Implementation of the PSR's recommendations would have resulted in a sentence of almost six more years, to run consecutively with the six years to be served on the State conviction. At sentencing, however, it became clear that the Pre-Sentence Report understated the amount of time to be served on the State sentence. All parties agreed that Mr. Estrella's actual sentence was 2 years on the weapon possession count, to be followed by six years on the counts of possession of a controlled substance and money laundering. These sentences were to be served consecutively. In short, Mr. Estrella was sentenced to eight years for his State crimes.

In light of the fact that Mr. Estrella was serving a longer state sentence and the Pimental letter calculated the guidelines sentence at 46 to 57 months, the Court determined to use the Pimental calculation as its starting point for the guideline calculations.


There is no doubt that Mr. Estrella is a serial offender. This is his third conviction for illegal reentry. Once here in the United States, he has multiple convictions for violating our drug laws. He uses aliases and he has been a fugitive from justice. He does not merit leniency, but the sentence imposed must be reasonable considering all of the circumstances. As a guide to reasonableness, the Court considered all the factors in 18 U.S.C. § 3553, and recognized that the guidelines are not mandatory, but discretionary. The Court also considered U.S.S.G. § 5G1.3(c) cmt. 3(A)(i)-(v) (2007) in determining whether the sentence should be concurrent or consecutive.

Mr. Estrella's crime of illegal reentry is serious, and has occurred at least twice before. In these circumstances, a sentence of 36 months was appropriate and reasonable. Since illegal reentry is a completely separate crime from the criminal conduct which led to the State prosecution, there was no good and sufficient reason to run the federal sentence concurrent with the State conviction.

In short, there is no basis for the sentencing relief Mr. Estrella seeks under 28 U.S.C. § 2255 or 18 U.S.C. § 3582(c)(2); and, accordingly, each is denied. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438 (1962).

Dated: New York, New York  
March 18, 2015

SO ORDERED

  
\_\_\_\_\_  
PAUL A. CROTTY  
United States District Judge

Copy Mailed By Chambers To:

Gilberto Estrella  
60658-054  
CI Moshannon Valley  
555 Geo Drive  
Philipsburg, PA 16866

# Exhibit “A”

09. July. 09

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

APPLICATION FOR LEAVE TO FILE A SECOND OR  
SUCCESSIVE MOTION TO VACATE, SET ASIDE  
OR CORRECT SENTENCE

28 U.S.C. § 2255

BY A PRISONER IN FEDERAL CUSTODY  
That is currently in State Custody.

RECEIVED  
2009 JUL 15 AM 11:07  
U.S. COURT OF APPEALS  
CLERK'S OFFICE

NAME:

Gilberto Estrella

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: March 18, 2015

PLACE OF CONFINEMENT:

Gouverneur C.F.  
Gouverneur, New York

PRISONER NUMBER:

07A3414  
USMS#60658054

INSTRUCTIONS—READ CAREFULLY

- (1) This application must be legibly handwritten or typewritten and signed by the applicant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury.
- (2) All questions must be answered concisely in the proper space on the form.
- (3) The Judicial Conference of the United States has adopted the 8½ x 11 inch paper size for use throughout the federal judiciary and directed the elimination of the use of legal size paper. All pleadings must be on 8½ x 11 inch paper, otherwise we cannot accept them.
- (4) All applicants seeking leave to file a second or successive petition are required to use this form, except in capital cases. In capital cases only, the use of this form is optional.
- (5) Additional pages are not permitted except with respect to additional grounds for relief and facts which you rely upon to support those grounds. Do not submit separate petitions, motions, briefs, arguments, etc., except in capital cases.
- (6) In accordance with the "Antiterrorism and Effective Death Penalty Act of 1996," as codified at 28 U.S.C. § 2255, effective April 24, 1996, before leave to file a second or successive

PC 2-

motion can be granted by the United States Court of Appeals, it is the applicant's burden to make a prima facie showing that he satisfies either of the two conditions stated below.

A second or successive motion must be certified as provided in [28 U.S.C.] section 2255 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

(7) When this application is fully completed, the original and four copies must be mailed to:

**Clerk of Court  
United States Court of Appeals for the Second Circuit  
United States Courthouse  
40 Foley Square  
New York, New York 10007**

I am within the 1 year period allowed by law.  
(see exhibits A-B-C.)

\*\*\*\*\* I am currently incarcerated at Gouverneur C.F., located in Gouverneur, New York, and have already cop-ed out to a 3 year sentence with the Federal Gouvernment, that is to run consecutive to/after my State time is completed, in a few years.

I am challenging that sentence, as I do want to be deported, and feel it is harsh & ridig to run the time consecutively, and not concurrent with my existing sentence. I have currently completed "all" state programs, and even the drug ASAT drug program, and do have a place to live in the Dominican Republic.

I thank you for your help and assistance as my english is weak, and I will need a spanish lawyer assistance, as now I am going to our law library.\*\*\*\*\*

06/25/07 SRCL009 RECEPTION/CLASSIFICATION SYSTEM \*RCLASS\* PAGE 001  
 09:31:07 LEGAL DATE COMPUTATION COMP DATE: 06/22/2007  
 BY: CCLMBNV )

TYPE 90 (MANUAL COMPUTATION

DIN: 07A3414 NAME: ESTRELLA, GILBERTO

NYSID: 4697869N

CURRENT LOCATION: DWNSTATE REC - 02-0F-002

DATE RECEIVED	2007 06 19		
MINIMUM TERM	007 01 18	TIME TO SERVE (MINIMUM)	006 06 11
MAXIMUM TERM	008 00 00	TIME TO SERVE (MAXIMUM)	007 04 23
JAIL TIME (DAYS)	0217	TIME OWED (MINIMUM)	
DATE SENTENCED		TIME OWED (MAXIMUM)	999 99 99
ORIG. MAX. EXP. DATE	9999 99 99	PAROLE JAIL TIME (DAYS)	
DATE DECLARED DELINQUENT	2006 11 14	NET TIME OWED	
DATE RETURNED		PRIOR TIME CREDIT	
ORIG. DATE RECEIVED		SUPPLEMENTAL MERIT TIME POSS.	
DATE RELEASED		MERIT TIME POSSIBLE	00 10 12
DATE FAILED TO RETURN		GOOD TIME ADJUSTMENT	
DATE ESCAPED		GOOD TIME POSSIBLE	000 00 00
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OTHER STATE SENT. DATE		SUPPLEMENTAL MERIT ELIG DT	
DATE DISCHARGED		MERIT ELIGIBILITY DATE	2013 02 17
DATE REAFFIRMED		PAROLE ELIGIBILITY DATE	2013 12 29
MEPS		PAROLE HEARING DATE/TYPE	2012 12 MERT
PAROLE BOARD DISCHARGE		TENTATIVE RELEASE DATE	
PRS 05 00 00 PRS ME		MAXIMUM EXPIRATION DATE	9999 99 99
		CONDITIONAL RELEASE DATE	9999 99 99
		T.A.C. DATE/TYPE	FMAX

REMARKS: RPV/CS DET/CS INDET

DIST: IRC (1), GUID & COUNS UNIT (1), INST PAROLE (1), INMATE (1)

EXHIBIT A





STATE OF NEW YORK  
DEPARTMENT OF CORRECTIONAL SERVICES  
**FIVE POINTS CORRECTIONAL FACILITY**

CALLER BOX 400  
STATE ROUTE 96  
ROMULUS, NEW YORK 14541

**BRIAN S. FISCHER**  
COMMISSIONER

607-869-5111

**JOHN B. LEMPKE**  
SUPERINTENDENT

July 7, 2008

United States Marshal  
Southern District of NY  
500 Pearl Street  
New York, NY 10007

Re: Estrella, Gilberto (#07A3414)  
CR#: 07 CR 1117  
USMS#: 60658-054

Dear Sir/Madam:

The following warrant has been received at this facility and is being lodged as a detainer against the above-named inmate:

**STATE OF NEW YORK- UNITED STATES MARSHAL- SOUTHERN DISTRICT-DTD: 6/26/08**

**Sentenced to 36 Months Consecutive to NYS Sentence**

His legal dates are as follows:	Earliest Release Date:	12/29/2013
	Conditional Release Date:	None
	Maximum Expiration Date:	Life

Your office will be notified thirty days before release.

Sincerely,

Susan A. Leubner  
IRC Office, Clerk II  
(607) 869-5111 Ext. 4103

Encs.  
/sal

cc. Guidance, Parole, Central File, Inmate, File

---

**INMATE:**    ☒ Not eligible for speedy trial.  
              ( ) If you wish a speedy trial or prompt disposition, contact the Law Library.  
              ( ) If you wish a speedy trial in accordance with Section 580.20 C.P.L. (Interstate Agreement on Detainers) sign the original of the attached forms and return to this office.

*EXHIBIT B*

U.S. Department of Justice  
United States Marshals Service



# DETAINDER

07A 3414

## BASED ON FEDERAL JUDGMENT AND COMMITMENT

United States Marshal

*Southern District NY*  
(District)  
*500 Canal Street*  
*NY NY 10017*

(Return Address and Phone)

*212-351-7136/716*

Please type or print neatly:

TO: Five Points Correctional Facility  
State Route 96  
Romulus, NY 14541

DATE: 06/10/2008

SUBJECT: Estrella, Gilberto

AKA:

DOB/SSN: 04/13/1963

REF. # DIN 07A3414

USMS #: 60658-054

CR #: 07 CR 1117

Please accept this Detainer against the above-named subject who is currently in your custody. The United States District Court for the Southern District of New York has issued a **Judgment and Commitment Order** against the subject. The attached **Judgment and Commitment Order** commits the subject to the custody of the U.S. Attorney General to serve the following sentence of imprisonment:

Sentenced to 36 months to run CONSECUTIVE to state sentence.

Prior to the subject's release from your custody, please notify this office at once so that we may assume custody of the subject for service of his Federal sentence of imprisonment. If the subject is transferred from your custody to another detention facility, we request that you forward our Detainer to said facility at the time of transfer and advise this office as soon as possible. The notice and speedy trial requirements of the Interstate Agreement on Detainers Act do NOT apply to this Detainer.

Please acknowledge receipt of this Detainer. In addition, please provide one copy of the Detainer to the subject and return one copy of the Detainer to this office in the enclosed self-addressed envelope:

RECEIPT	
Date:	<i>6/10/08</i>
Signed:	
By:	<i>B. Castellano</i>
Title:	<i>Chief</i>

Very truly yours,

(Signature)

Joseph Guccione

U.S. Marshal

Requested by: Fredrick W. Lamey

(EXHIBIT B)

EXHIBIT C

**On Deadline: What others are reporting**

**Feds often give leniency for guilty pleas**

Federal prosecutors often cut deals with serious criminals, including murderers, drug dealers and gang members, offering leniency in exchange for a guilty plea and testimony in court, *The Baltimore Sun* reported ([baltimoresun.com](http://baltimoresun.com)). In the first quarter of this year, 96% of federal cases garnered guilty



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24/7 website for news from  
around the nation and the  
world.

pleas, the newspaper  
said, citing data from  
the U.S. Sentencing  
Commission.

Defense attorneys  
say it gives coopera-  
tors incentive to lie.  
"Their testimony is es-  
sentially bought and  
paid for," John Wesley Hall, president of the National  
Association of Criminal Defense Lawyers, told the  
*Sun*. Prosecutors tell the *Sun* that the deals are nec-  
essary to get information about criminal groups.  
"Often the people who are in the best position to be  
witnesses in a case are the people who themselves  
have been involved in the criminal activity," Mary-  
land U.S. Attorney Rod Rosenstein said.

By John Bacon with staff and wire reports

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Monon?

## APPLICATION

1. (a) State and division of the United States District Court which entered the judgment of conviction under attack SOUTHERN DISTRICT OF NEW YORK  
 (b) Case number 07CR1117 #60658-054
2. Date of judgment of conviction JULY 7TH 2008  
RECEIVED JULY 15TH, 2008
3. Length of sentence 3 YEARS Sentencing Judge JOSEPH GUCCIONE
4. Nature of offense or offenses for which you were convicted:  
ILLEGAL RE-ENTRY (1 COUNT) OF A DEPORTED  
ASSUMED FELON
5. Have you taken a direct appeal relating to this conviction and sentence in the federal court?  
 Yes ( ) No (☒) If "yes", please note below:  
 (a) Name of court \_\_\_\_\_  
 (b) Case number \_\_\_\_\_  
 (c) Grounds raised (list all grounds; use extra pages if necessary) \_\_\_\_\_  
THIS IS MY FIRST APPLICATION  
RECOMMENDED BY THE PRO-SE  
OFFICE  
 (d) Result \_\_\_\_\_  
 (e) Date of result \_\_\_\_\_
6. Related to this conviction and sentence, have you ever filed a motion to vacate in any federal court?  
 Yes ( ) No (☒) If "yes", how many times? \_\_\_\_\_ (if more than one, complete 6 and 7 below as necessary)  
 (a) Name of court \_\_\_\_\_  
 (b) Case number \_\_\_\_\_  
 (c) Nature of proceeding \_\_\_\_\_  
 (d) Grounds raised (list all grounds; use extra pages if necessary) \_\_\_\_\_  
N/A

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )

(f) Result \_\_\_\_\_

(g) Date of result \_\_\_\_\_

7. As to any second federal motion, give the same information:

(a) Name of court \_\_\_\_\_

(b) Case number N/A

(c) Nature of proceeding \_\_\_\_\_

(d) Grounds raised (list all grounds; use extra pages if necessary) \_\_\_\_\_

N/A

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )

(f) Result \_\_\_\_\_

(g) Date of result \_\_\_\_\_

8. As to any third federal motion, give the same information:

(a) Name of court \_\_\_\_\_

(b) Case number N/A

(c) Nature of proceeding \_\_\_\_\_

(d) Grounds raised (list all grounds; use extra pages if necessary) \_\_\_\_\_

N/A

(e) Did you receive an evidentiary hearing on your motion? Yes ( ) No ( )

(f) Result \_\_\_\_\_

(g) Date of result N/A

9. Did you appeal the result of any action taken on your federal motions? (Use extra pages to reflect additional federal motions if necessary)

(1) First motion No (X) Yes ( ) Appeal No. \_\_\_\_\_

(2) Second motion

No (☒) Yes ( ) Appeal No. \_\_\_\_\_

(3) Third motion

No (☒) Yes ( ) Appeal No. \_\_\_\_\_

10. If you did not appeal from the adverse action on any motion, explain briefly why you did not:

(SEE LETTER EXHIBIT D)  
 MY ENGLISH IS WEAK. I DID NOT KNOW IT  
 WAS RUNNING CONSECUTIVE. I WANT TO BE DEPORTED  
 AND GO TO MY COUNTRY DOMINICAN REPUBLIC, AS SOON  
 AS POSSIBLE.

11. State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

- A. Ground one: I REQUIRE A ICS # AND A APPOINTED DATE  
FOR "early" DEPORTATION.

Supporting FACTS (tell your story briefly without citing cases or law):

NEW MORE LENIENT LANS PROBABLY BEING ORSED  
OVER THE LAST (2) YEARS ENABLE ME, WHO IS  
PROGRAM COMPLYING TO BE DEPORTED EARLIER. I AM  
NOW REQUESTING THAT.

Was this claim raised in a prior motion? Yes ( ) No ( ) (NONE)

Does this claim rely on a "new rule of law?" Yes (☒) No ( )

If "yes," state the new rule of law (give case name and citation):

Does this claim rely on "newly discovered evidence?" Yes ( ) No ( )

If "yes," briefly state the newly discovered evidence when it was discovered, and why it was not previously available to you.

237(A)(2)(A)(iii) + (B)(i)  
Immigration and Nationality Act  
(Act) ENABLES ME TO "apply for" early deportation  
AND HAVE MY FEDERAL TIME RUN CONCURRENT -  
NOT CONSECUTIVE TO MY STATE TIME

- B. Ground two: Section 102 of the Consular Dismissal  
Act 21 U.S.C. 802)

Supporting FACTS (tell your story briefly without citing cases or law):

(SEE EXHIBIT D)

Was this claim raised in a prior motion? Yes ( ) No (☒)

Does this claim rely on a "new rule of law?" Yes ( ) No ( )

If "yes," state the new rule of law (give case name and citation):

JUST SEE EXHIBIT C THAT THERE ARE MANY "NEW"  
DEPORTATION ORDERS I HAVE I QUALIFY FOR 1 OF  
THEM, AND MY SITUATION

Does this claim rely on "newly discovered evidence?" Yes (☒) No ( )

If "yes," briefly state the newly discovered evidence when it was discovered, and why it was not previously available to you.

NEWSPAPER ARTICLES AND THE FACT I HAVE  
COMPLETED ALL MY REQUIRED STATE PROGRAMS

[Additional grounds may be asserted on additional pages if necessary]

12. Do you have any motion or appeal now pending in any court as to the judgment now under attack? Yes ( ) No (☒)

If "yes," name of court \_\_\_\_\_ Case number \_\_\_\_\_

Wherefore, applicant prays that the United States Court of Appeals for the Second Circuit grant an Order Authorizing the District Court to Consider Applicant's Second or Successive Motion to Vacate under 28 U.S.C. § 2255.

Gilberto Estrella

Gilberto Estrella Applicant's Signature

I declare under Penalty of Perjury that my answers to all the questions in this Application are true and correct.

Executed on 7/5/2009  
[date]

Gilberto Estrella  
Applicant's Signature  
Gilberto Estrella

Sworn to me on this 5 day of  
July, 2009. Page 6

[Signature]  
Notary Public

T. Christopher Reed  
Notary Public, State of New York  
No. 01RE6074262  
Qualified in St. Lawrence County  
Commission Expires: 5/17/2010

## 2009 Rockefeller Drug Law Reforms

The Legislature has enacted historic revisions of the Rockefeller Drug Laws as part of the 2009-2010 budget. Many of the changes will be effective immediately upon enactment of the state budget, and will apply to pending cases. Here is a summary of the highlights of the legislation. A copy of the bill is also attached.

### 1. NEW SENTENCING LAWS FOR DRUG CRIMES (EFFECTIVE IMMEDIATELY)

#### First Felony Drug & Marijuana Offenses

Class B: Imprisonment will no longer be mandatory – Probation, a split sentence, a definite jail term, and a determinate state prison term between 1 and 9 years (with post-release supervision) will be authorized. If imposing a state prison sentence, the court may order the defendant be directly placed in the Willard drug treatment program as part of a sentence of parole supervision (see CPL § 410.91). The court may also order the client directly placed in the SHOCK incarceration program. Note: a separate budget bill this year will increase the maximum age for SHOCK placement to 50 (from 40).

Class C, D and E: Imprisonment will continue to be discretionary, not mandatory. All non-incarcerative dispositions are authorized. The sentencing court may order the client directly placed in the SHOCK incarceration program. Although debatable given the statutory language, Willard will probably not be an available option for these clients, who are not subject to mandatory imprisonment.

#### Second Felony Offenders (with non-violent prior felony conviction)

Class B: Imprisonment is required unless a defendant is diverted for drug or alcohol treatment pursuant to new section 216 of the Criminal Procedure Law, which authorizes diversion in the court's discretion (i.e., without D.A. consent) following an alcohol and substance abuse evaluation (see below). Although the judicial diversion option will be available for defendants who committed crimes prior to the effective date of the legislation, it does not go into effect until October 2009. Therefore, adjournments will be necessary for current defendants who wish to avail themselves of the diversion option.

The minimum state prison sentence for Class B second felony drug offenders (with a prior government felony conviction) is 1½ years (18 months). The maximum is unlimited at 10 years. Therefore, Class B second felony offenders who are not judicially diverted to treatment, and are sentenced to less than 3½ years, will be SHOCK eligible, and may be directly placed in the program provided they otherwise meet eligibility requirements [age, no prior DOCS commitments, no exclusion convictions – see Corr. Law § 805 (1)].

Class C, D and E: Imprisonment is not required – all non-incarcerative dispositions are authorized, including judicial diversion pursuant to CPL § 216. In addition, Willard placement (without DA consent), and judicial SHOCK placement are available sentencing options.

(EXHIBIT D)



**Optional state prison sentences for second felony offenders (prior non-violent felony)**

Class C – A determinate sentence between 1 ½ (reduced from 2) to 8 years – plus PRS

Class D – A determinate sentence between 1 ½ to 4 years (unchanged) – plus PRS

Class E – 1 ½ - 2 (unchanged) – plus PRS

**Second Felony Offenders (with prior violent felony)**

The ameliorative sentencing changes are unavailable to clients who are second felony offenders with a predicate violent felony conviction. These defendants still face mandatory imprisonment, and will continue to be governed by Penal Law § 70.70 (4):

Class B – A determinate sentence between 6 - 15 years – plus PRS (categorical ineligibility for SHOCK)

Class C – A determinate sentence between 3 ½ - 9 years – plus PRS

Class D – A determinate sentence between 2 ½ - 4 ½ years – plus PRS

Class E – A determinate sentence between 2 - 2 ½ years – plus PRS

SHOCK eligibility for certain Class C, D and E offenses – including judicial placement - if the client otherwise meets eligibility requirements – i.e., release eligible within 3 years, no prior DOCS commitments, no exclusion convictions – see Corr. Law § 865 (1).

**2. DA CONSENT ELIMINATED FOR ALL WILLARD-ELIGIBLE OFFENSES (EFFECTIVE IMMEDIATELY)**

The bill repeals CPL § 410.91 (4), which requires D.A. consent to a Willard parole supervision sentence for certain Class D felony convictions. It also expands this sentencing option to first felony offenders. Therefore, without D.A. consent, courts may sentence first-time Class B offenders and second C, D, and E felony offenders (prior non-violent) to Willard upon conviction of the following crimes:

Criminal mischief in the second and third degrees

Grand larceny in the fourth degree (P.L. § 155.30 except subdivisions 7 and 11)

Grand larceny in the third degree (except firearms)

Unauthorized use of a vehicle in the second degree

Criminal possession of a stolen property in the third and fourth degrees (except firearms)

Forgery in the second degree

Criminal possession of forged instruments in the second degree

Unlawfully using drugs in the first degree

Surgery in the third degree

Also Willard eligible: First time Class B drug offenders, and certain second felony Class C, D and E drug & marijuana offenders (prior non-violent).

---

### 3. JUDICIAL DIVERSION PROGRAM (EFFECTIVE OCTOBER 7, 2009)

The centerpiece of the bill is authorization for a court to divert most drug and marijuana offenders with an identified alcohol or substance abuse problem to treatment. It provides that courts may divert drug offenders (Class B through E), including second felony drug offenders, to in-patient or out patient treatment programs in lieu of prison without consent of the D.A. Courts may also order judicial diversion for defendants charged with Willard eligible crimes (see CPL § 410.91).

Excluded from diversion eligibility are:

- 1.) second felony drug offenders with predicate violent felony offense convictions;
- 2.) defendants with a conviction for a merit time ineligible offense within the preceding 10 years (generally sex and homicide offenses, see Corr. Law § 803 (1) (d)(ii);
- 3.) defendants with a Class A felony drug conviction within the preceding 10 years;
- 4.) defendants who have ever been adjudicated a second violent felony offender or a persistent violent felony offender.

Also ineligible for diversion are defendants currently charged with a violent felony offense, or a merit time ineligible offense, for which imprisonment is mandatory upon conviction, while such charge is pending. However, the court may order diversion in any of the above situations with consent of the D.A.

After ordering and receiving an alcohol and substance abuse evaluation, the court must make findings with respect to whether:

- a. the defendant is statutorily eligible for diversion
- b. the defendant has a history of alcohol or substance abuse or dependence;
- c. such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;
- d. the defendant's participation in judicial diversion could effectively address such abuse or dependence; and
- e. institutional confinement of the defendant is or may not be necessary for the protection of the public.

Generally, a guilty plea will be required for judicial diversion, but the court may, in exceptional circumstances, where the plea is "likely to result in severe collateral consequences," order diversion without a guilty plea. The court will have a range of options upon the defendant's successful completion of the diversion program, including allowing the defendant to withdraw a guilty plea and dismissing the indictment or sustaining a judgment of conviction in lieu of the felony. The court will also have a range of options when a defendant is unsuccessful in the diversion program, including imposing a state prison sentence for the crime of conviction or a lesser offense. The legislation directs courts to consider that "persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse" and to consider using a "system of graduated and appropriate responses or sanctions."

**4. CONDITIONAL SEALING OF RECORDS UPON COMPLETION OF JUDICIAL DIVERSION OR SIMILAR DRUG TREATMENT PROGRAM (EFFECTIVE: JUNE 7, 2009)**

The legislation authorizes courts to conditionally seal records of drug, marijuana and Willard-eligible non-drug crimes (see CPL §410.91) upon a defendant's successful completion of a judicial diversion program, DTAP or similar substance abuse treatment program. Sealing authority will also extend to up to three of the defendant's prior misdemeanor drug or marijuana convictions. A new arrest for a crime will effectively unseal these records unless the criminal action terminates in the defendant's favor pursuant to CPL § 160.50 or results in a non-criminal disposition pursuant to CPL § 160.55.

**5. RESENTENCING OF INMATES CONVICTED AND SENTENCED TO INDETERMINATE TERMS UNDER FORMER LAW (MOST PROVISIONS EFFECTIVE OCTOBER 7, 2009)**

**The resentencing provisions of the reforms are not effective until October 7, 2009.**

The bill authorizes discretionary resentencing of inmates who were convicted of Class B drug offenses committed **prior to January 13, 2005**, and sentenced to **indeterminate terms** under the old sentencing law. Inmates serving indeterminate terms with maximum terms of "more than 3 years" (e.g., 2 – 4 years) may petition the sentencing court for resentencing under the new determinate sentencing scheme. As part of the application, the inmate may also move for resentencing on any Class C, D, or E drug or marijuana convictions "which were imposed by the sentencing court at the same time or were included in the same order of commitment as such class B felony." The resentencing procedure will be governed by the same rules included in the 2004 Drug Law Reform Act. Inmates will have the immediate right to appointed counsel to prepare and file the petition, and the right to appeal from adverse determinations.

**Exclusions:** Inmates who are serving time for or have been convicted within the preceding 10 years, exclusive of time in custody, of a violent felony, or a merit-time ineligible offense [see Corr. Law § 803 (1) (d) (ii)], or who were adjudicated a second violent felony offender or a persistent violent felony offender, are ineligible for resentencing.

**6. NEW CRIMES (EFFECTIVE NOVEMBER 1, 2009)**

The legislation enacts new crimes and enhanced sentencing for sale of a controlled substance by an adult over age 18 to a minor under age 17, and for so-called drug hospitals. The "drugpoint" statute applies to directors and providers of purported substance organizations. The monetary threshold for criminal liability is set at \$75,000 over the course of 6 months or one year, depending on the defendant's role in the organization. (Bill sections 28 and 29).

PROOF OF SERVICE

Applicant must send a copy of this application and all attachments to the United States Attorney's office in the district in which you were convicted.

I certify that on July 5th, 2009, I mailed a copy of this Application\* and  
[date]  
all attachments to Pro se Office New York Southern District

at the following address:

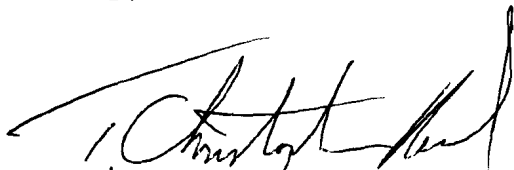
Pro Se Office 500 Pearl Street  
US Southern District New York, New York 10007



Applicant's Signature

Gilberto Estrella  
Gouverneur C.F.  
P.O.Box #480  
Gouverneur, New York  
13642

Sworn to me on this 5 day of  
July, 2009.



~~Notary~~ Public

T. Christopher Reed  
Notary Public, State of New York  
No. 01RE6074262  
Qualified in St. Lawrence County  
Commission Expires: 5/13/2010

\* Pursuant to Fed.R.App.P. 25(a), "Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day of filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

CLOSED, ECF

**U.S. District Court**  
**United States District Court for the Southern District of New York (Foley Square)**  
**CRIMINAL DOCKET FOR CASE #: 1:07-cr-01117-PAC-1**

Case title: USA v. Estrella

Date Filed: 12/07/2007

Date Terminated: 05/29/2008

Assigned to: Judge Paul A. Crotty

**Defendant (1)**

**Gilberto Estrella**

*TERMINATED: 05/29/2008*

*also known as*

Pedro Fana

*TERMINATED: 05/29/2008*

*also known as*

David Bolivar-Ceballos

*TERMINATED: 05/29/2008*

*also known as*

Jose Luis Negron-Molina

*TERMINATED: 05/29/2008*

represented by **David E. Patton**

Federal Defenders of New York Inc.  
(NYC)

52 Duane Street

10th Floor

New York , NY 10007

212-417-8700

Fax: 212-571-0392

Email: david\_patton@fd.org

**LEAD ATTORNEY**

**ATTORNEY TO BE NOTICED**

*Designation: Public Defender or*

*Community Defender Appointment*

**Pending Counts**

8:1326A.F REENTRY OF DEPORTED  
ALIENS (ILLEGAL REENTRY)

(1)

**Disposition**

Imprisonment for a total term of Thirty-Six Months to run consecutively with the New York State sentence Mr. Estrella is currently serving. Supervised release for a term of Three Years.

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

None

**Disposition**

**Highest Offense Level (Terminated)**

None

**Complaints**

None

**Disposition****Plaintiff**

USA

represented by **Howard Seth Master**  
 U.S. Attorney's Office, SDNY (St  
 Andw's)  
 One St. Andrew's Plaza  
 New York , NY 10007  
 (212)-637-2248  
 Fax: (212)-637-2937  
 Email: howard.master@usdoj.gov  
*TERMINATED: 01/02/2008*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
12/07/2007	1	INDICTMENT FILED as to Gilberto Estrella (1) count(s) 1. (jm) (Entered: 12/10/2007)
12/07/2007		Case Designated ECF as to Gilberto Estrella. (jm) (Entered: 12/10/2007)
12/17/2007	2	MOTION for Writ of Habeas Corpus ad prosequendum as to Gilberto Estrella. Document filed by Gilberto Estrella. (Master, Howard) (Entered: 12/17/2007)
12/17/2007	3	AFFIRMATION of Howard S. Master in Support by USA as to Gilberto Estrella re <u>2</u> MOTION for Writ of Habeas Corpus ad prosequendum as to Gilberto Estrella.. (Master, Howard) (Entered: 12/17/2007)
12/21/2007	7	CJA 23 Financial Affidavit by Gilberto Estrella. Approved, David Patton appointed. (Signed by Judge Magistrate Judge Ronald L. Ellis) (ja) (Entered: 04/10/2008)
12/28/2007		Calendar Entry: Initial Pretrial Conference before Judge Paul A. Crotty scheduled for Thursday, January 3, 2008 at 2:15 PM in Courtroom 20-C (Scheduled via e-mail by chambers - Marlon Ovalles). (mov) (Entered: 01/02/2008)
01/02/2008		Attorney update in case as to Gilberto Estrella. Attorney David E. Patton for Gilberto Estrella added.. (mov) (Entered: 01/02/2008)
01/03/2008		Minute Entry for proceedings held before Judge Paul A. Crotty: Defendant present with AFD David E. Patton. AUSA Howard S. Master present. Court Reporter Carol Gangley present. Spanish Interpreter Paula Gold present. The next conference will go forward on Tuesday, February 5, 2008 at 2:00 PM in Courtroom 20-C. At the next conference, defense counsel will report the status of discovery review or inform the Court of any contemplated motion(s) that might be filed. Upon no objection in open Court, and in the interest of justice,

		the Court excludes the period of time from January 3, 2008, to Tuesday, February 5, 2008, under the Speedy Trial Act. The defendant continues remanded. See transcript for complete details of this proceeding. Pretrial Conference as to Gilberto Estrella held on 1/3/2008, As to Gilberto Estrella (Pretrial Conference set for 2/5/2008 at 02:00 PM in Courtroom 20C, 500 Pearl Street, New York, NY 10007 before Judge Paul A. Crotty.) (mov) (Entered: 01/03/2008)
02/04/2008		Calendar Entry: **Conference Reminder** Pretrial Conference set for Tuesday, February 5, 2008 at 2:00 PM in Courtroom 20-C (By: Marlon Ovalles - CRD). (mov) (Entered: 02/04/2008)
02/04/2008	4	ENDORSED LETTER as to Gilberto Estrella addressed to Judge Crotty from Attorney David Patton dated 2/4/08 re: submitted to request a brief adjournment of tomorrow's status conference. ENDORSEMENT: Application GRANTED. The conference is adjourned to 2/14/08 at 2:00 in Courtroom 20C. It is further that pursuant to 18 U.S.C. 3161(b)(8)(A), the time from 2/5/08 until 2/14/08 is excluded in the interest of justice. I find that this exclusion outweighs the best interest of the defendant and the public in a speedy trial. (Signed by Judge Paul A. Crotty on 2/4/08)(bw) (Entered: 02/04/2008)
02/04/2008		Set/Reset Hearings as to Gilberto Estrella: Pretrial Conference set for 2/14/2008 at 02:00 PM before Judge Paul A. Crotty.(bw) (Entered: 02/04/2008)
02/13/2008		Calendar Entry ***CONFERENCE REMINDER*** as to Gilberto Estrella: Pretrial conference set for Thursday, February 14, 2008 at 2:00 PM before Judge Paul A.Crotty, U.S.D.J, in Courtroom 20-C (By: Marlon Ovalles - CRD). (mov) (Entered: 02/13/2008)
02/14/2008		Minute Entry for proceedings held before Judge Paul A. Crotty:Initial Appearance as to Gilberto Estrella held on 2/14/2008. (jw) (Entered: 02/20/2008)
02/14/2008		Minute Entry for proceedings held before Judge Paul A. Crotty:Arraignment as to Gilberto Estrella (1) Count 1 held on 2/14/2008. Deft present with atty AFD David Patton. USA Howard Master present. Court reporter Eve Giniger present. The deft pleads not guilty. (jw) (Entered: 02/20/2008)
02/14/2008		Minute Entry for proceedings held before Judge Paul A. Crotty: Plea entered by Gilberto Estrella (1) Count 1 Not Guilty. (jw) (Entered: 02/20/2008)
02/14/2008		Minute Entry for proceedings held before Judge Paul A. Crotty:Change of Plea Hearing as to Gilberto Estrella held on 2/14/2008. Deft present with atty AFD David Patton. AUSA Howard Master present. Court Reporter Eve Giniger present. The defendant withdrew his previously entered not guilty plea and entered a plea of guilty to the Indictment as charged. The Court accepted the defendant's guilty plea and ordered the PSI. The sentencing is set for Thursday, May 15, 2008 at 2:30pm. The defendant continues remanded. See transcript for complete details of this proceeding. (jw) (Entered: 02/20/2008)
02/14/2008		Change of Not Guilty Plea to Guilty Plea as to Gilberto Estrella (1) Count 1. (jw) (Entered: 02/20/2008)



02/14/2008		Minute Entry for proceedings held before Judge Paul A. Crotty: Plea entered by Gilberto Estrella (1) Guilty as to Count 1. (jw) (Entered: 02/20/2008)
02/14/2008		Order of Referral to Probation for Presentence Investigation and Report as to Gilberto Estrella. (Signed by Judge Paul A. Crotty on 2/14/08)(jw) (Entered: 02/20/2008)
02/14/2008		Minute Entry for proceedings held before Judge Paul A. Crotty: as to Gilberto Estrella; Sentencing set for 5/15/2008 at 02:30 PM before Judge Paul A. Crotty. (jw) (Entered: 02/20/2008)
02/20/2008	5	TRANSCRIPT of Proceedings as to Gilberto Estrella held on 1/3/08 before Judge Paul A. Crotty. (jbe) (Entered: 02/20/2008)
03/18/2008	6	TRANSCRIPT of Proceedings as to Gilberto Estrella held on 2/14/2008 before Judge Paul A. Crotty. (jp) (Entered: 03/18/2008)
05/14/2008	8	ENDORSED LETTER as to Gilberto Estrella addressed to Judge Crotty from David Patton dated 5/13/08 re: Adjournment of the sentencing. Application granted. The sentence is adjourned to 5/28/08 @ 4:30pm, in courtroom 20C. So Ordered.. (Signed by Judge Paul A. Crotty on 5/14/08)(pr) (Entered: 05/14/2008)
05/14/2008		Set/Reset Hearings as to Gilberto Estrella: Sentencing set for 5/28/2008 at 04:30 PM before Judge Paul A. Crotty.. (pr) (Entered: 05/14/2008)
05/23/2008	9	SENTENCING MEMORANDUM by USA as to Gilberto Estrella. (Master, Howard) (Entered: 05/23/2008)
05/27/2008		Calendar Entry (**Time and Courtroom Change**): The previously scheduled Sentencing set for Wednesday, May 28, 2008 at 4:30 PM will now go forward at 4:40 PM in Courtroom 11-C NOT 20-C. All parties shall update there calendars accordingly. (By: Marlon Ovalles - CRD). (mov) (Entered: 05/27/2008)
05/28/2008		Minute Entry for proceedings held before Judge Paul A. Crotty: Sentencing held on 5/28/2008 for Gilberto Estrella (1) Count 1. (jw) (Entered: 06/03/2008)
05/29/2008	10	FILED JUDGMENT IN A CRIMINAL CASE as to Gilberto Estrella (1), Pleaded guilty to Count(s) 1, Imprisonment for a total term of Thirty-Six Months to run consecutively with the New York State sentence Mr. Estrella is currently serving. Supervised release for a term of Three Years. The Court makes the following recommendations to the Bureau of Prisons: The Court recommends that Mr. Estrella be designated to a BOP facility located in or around the NYC Metropolitan area. In the alternative, the Court recommends that Mr. Estrella be designated to a BOP facility located in the Northeast Region of the US. The Court further recommends that Mr. Estrella be enrolled in the 500-hour drug and alcohol treatment program. Special Assessment of \$100 which is due immediately. (Signed by Judge Paul A. Crotty on 5/29/08) (jw) (Entered: 06/03/2008)
06/03/2008		Judgment entered in money judgment book as #08,0972 as to Gilberto Estrella in the amount of \$ 100.00, re: 10 Judgment. (dt) (Entered: 06/05/2008)



07/08/2008	11	TRANSCRIPT of Proceedings as to Gilberto Estrella held on 5/28/08 before Judge Paul A. Crotty. (ama) (Entered: 07/08/2008)
07/08/2008	12	TRANSCRIPT of Proceedings as to Gilberto Estrella held on 5/28/08 before Judge Paul A. Crotty. (ama) (Entered: 07/08/2008)

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
07/15/2009 11:21:04			
<b>PACER Login:</b>	uc0166	<b>Client Code:</b>	
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	1:07-cr-01117-PAC
<b>Billable Pages:</b>	3	<b>Cost:</b>	0.24

# Exhibit “B”



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: March 18, 2015

GILBERTO ESTRELLA #07A3414

PETITIONER,  
DEFENDANT, Appellant

- AGAINST -

UNITED STATES OF AMERICA

Plaintiff/Appellee

APPLICATION FOR APPOINTMENT  
OF COUNSEL pursuant to  
18 U.S.C. § 3006A(g)  
(habeas corpus petition)

Docket # 09-3014-op

CASE # 07-CR-1117

Judge Paul Crotty  
August 3rd, 2009

1. Name of applicant GILBERTO ESTRELLA
2. Explain why you feel you need a lawyer in this case. (Use additional paper if necessary.) *I speak very little English, I went to the law library for help - Federal law is not easy to do, Appellate law is even more difficult. By law, Douglas vs California 372 US 353, I am requesting representation, please.*
3. Explain what steps you have taken to find an attorney and with what results. (Use additional paper if necessary.) *I wrote 8 letters to law firms, and Pro Se Magazine, but all so far said no, to pro bono representation.*
4. If you need a lawyer who speaks in a language other than English, state what language you speak: Spanish

I declare under the penalties of perjury that my answers to the foregoing questions are true to the best of my knowledge.

I understand that if I am assigned a lawyer and my lawyer learns, either from myself or elsewhere, that I can afford a lawyer, the lawyer may give this information to the Court.

I understand that if my answers on my application to Proceed in Forma Pauperis are false, my case can be dismissed.

Dated: August 3rd, 2009.

Gilberto Estrella  
Signature

GILBERTO ESTRELLA  
GOVERNOR COR. Facility

(SEE -  
EXHIBIT A)



UNITED STATES DISTRICT COURT  
SOUTHERN OF NEW YORK.

GILBERTO ESTRELLA #07A3414  
 (petitioner/plaintiff)

-v-

UNITED STATES OF AMERICA  
 (Respondent(s) (Defendant))

Docket # 09-3014-02

CASE # 07-CR-1117

AUGUST 3RD, 2009

I, GILBERTO ESTRELLA, am the petitioner/plaintiff in the above-entitled case. in support of my motion to proceed without being required to prepay fees or costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore, that I believe I am entitled to redress. I declare that the responses which I have made below are true.

1. If you are presently employed, state the amount of your salary wage per month, and give the name and address of your last employer. YOU MUST ANSWER THIS QUESTION EVEN IF YOU ARE INCARCERATED. (I AM INCARCERATED)

I AM CURRENTLY INCARCERATED AT GOVERNOR CORRECTIONAL FACILITY #480 P.O. BOX, GOVERNOR, N.Y. 13642. I EARN \$6.00 EVERY (2) WEEKS.

2. If you are NOT PRESENTLY EMPLOYED, state the date of last employment and amount of the salary per month which you are receiving and how long the employment lasted. YOU MUST ANSWER THIS QUESTION EVEN IF YOU ARE INCARCERATIONED. IF YOU HAVE NEVER BEEN EMPLOYED, SAY SO.

I HAVE BEEN INCARCERATED THE LAST (3) YEARS, BEFORE THAT I HAD OWN JOB EARNING MINIMUM WAGE.

3. Have you ever received, within the past twelve months, any money from any of the following sources.?

- |   |   |  |
|---|---|--|
| a. Business, porfession, or form of self- employment? | YES <input type="checkbox"/>            | NO <input checked="" type="checkbox"/> |
| b. Rent payments, interest, or dividends?             | YES <input type="checkbox"/>            | NO <input checked="" type="checkbox"/> |
| c. Pensions, annuities, or life insurance payments?   | YES <input type="checkbox"/>            | NO <input checked="" type="checkbox"/> |
| d. Gifts or inheritances?                             | YES <input type="checkbox"/>            | NO <input checked="" type="checkbox"/> |
| e. Any form of public assistance?                     | YES <input type="checkbox"/>            | NO <input checked="" type="checkbox"/> |
| f. Any other sources?                                 | YES <input checked="" type="checkbox"/> | NO <input type="checkbox"/>            |
- Family for food & cosmetics



If the answer to any of the questions in part three is yes, describe each source of money and state the amount received from each during the past months.

4. Do you own any cash or do you have money in a checking or savings account?

YES \_\_\_\_\_ NO ☒ (Including any funds in prison accounts)

If the answer is yes, state the total value owned.

5. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (including ordinary household furnishings and clothing)?

YES \_\_\_\_\_ NO ☒

If the answer is yes, describe the property and state its approximate value.

6. List the person(s) who are dependent upon you for support, state your relationship to those person(s), and indicate how much you contribute toward their support at the present time.

*I have family back in my Country when I am  
Deported*

7. If you live in a rented apartment or other rented building, state how much you pay each month for rent. Do not include rent contributed by other people.

*N/A*

*N/A*

8. State any special financial circumstances which the court should consider in this application.

*I AM AN INCARCERATED INMATE*

I understand that a false statement or answer to any questions in this declaration will subject me to the penalties for perjury.

I declare under penalty of perjury that the forgoing is true and correct.

signed this 4 day of August 2009.

*[Signature]*

*Notary Public*

T. Christopher Reed  
Notary Public, State of New York  
No. 01RE6074262  
Qualified in St. Lawrence County  
Commission Expires: 5/13/2010

*[Signature]*

(Name)

*GILBERTO ESTRELLA #07A3414*

*GOVERNMENT CORR. FACILITY*



## CHAPTER 9

### APPEALING YOUR CONVICTION OR SENTENCE\*

#### A. Introduction

This Chapter discusses how you can appeal a conviction or sentence entered against you in a New York state trial court. Part B defines a criminal appeal. Part C discusses possible limits upon your right to appeal and requirements for preserving this right. Part D explains what you can do before the court hears your appeal, such as how to request release on bail while your appeal is pending. Part E describes the grounds on which an appellate court reviews your case, and what type of relief is available to you. Part F indicates what papers you need to fill out in order to appeal and where, when, and how to file these papers. Part G discusses the possibility of pursuing your claim if you lose on appeal.<sup>1</sup> Finally, Part H discusses your right to effective assistance of appellate counsel. You have a constitutional right to counsel for your appeal.<sup>2</sup> (The state must provide a lawyer to represent you if you cannot afford to hire one.)<sup>3</sup>

Although this Chapter deals specifically with New York law, it may give you some background information about the issues you may raise in an appeal in another state. If you have been convicted or sentenced in a federal court, your appeals will be governed by federal law. If you have been convicted or sentenced in a state court, that state's laws will govern your appeal. Your law library should have the information you need on your specific appeal.

There are two appendices at the end of this Chapter. Appendix A is a chart that indicates the court to which you should appeal. Appendix B provides sample papers for appeals, including papers needed to get a lawyer without cost, to get released on bail pending appeal, and to get an extension of time to take your appeal. You should read the entire Chapter before consulting these forms. These forms are samples only; *you must write your own versions of these papers*. If you simply tear these papers out of the book and send them to a court, the court may ignore them. If you complete the forms incorrectly, you may lose your chance to appeal.

Above all, keep in mind as you read this Chapter that timing is crucial to preserving your right to appeal.

#### B. What Is a Criminal Appeal?

If you have been convicted of a felony or misdemeanor<sup>4</sup> in a trial court, you may be able to appeal. An appeal allows you to take your case to a higher court (an "appellate court") that has the power to review, and potentially change, trial court decisions. As the "appellant," you will argue

\* This Chapter was revised by Sydney Bird, based on previous versions by Miranda Berge, Peggy Cross, Joy Fuyuno, Deidra D. Dixon, Janet Ellis, and Amy Metzler.

1. New York Criminal Practice Handbook, Chapter 22, *Appeals in Criminal Cases*. (Lawrence N. Gray ed., Lexis Nexis 2d ed. 1998), has been an important resource in the writing of this Chapter of the *JLM*. We strongly recommend it to the reader for a detailed, chronological discussion of the criminal appellate process in New York State.

2. See *Douglas v. California*, 372 U.S. 353, 356–58, 83 S. Ct. 814, 816–17, 9 L. Ed. 2d 811, 814–15 (1963) (holding that an indigent defendant has the right to counsel, including the right to have counsel appointed at the state's expense, during "the first appeal, granted as a matter of right").

3. See *Douglas v. California*, 372 U.S. 353, 356–58, 83 S. Ct. 814, 816–17, 9 L. Ed. 2d 811, 814–15 (1963) (holding that an indigent defendant has the right to counsel, including the right to have counsel appointed at the state's expense, during "the first appeal, granted as a matter of right").

4. A felony is a crime that is punishable by a prison term of more than one year. N.Y. Penal Law § 10.00(6) (McKinney 2004 & Supp. 2006). A misdemeanor is an offense, other than a "traffic infraction," that can be punished by a brief jail sentence of at least 15 days but no more than one year. N.Y. Penal Law § 10.00(5) (McKinney 2004 & Supp. 2006).



## AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK )  
COUNTY OF ST. LAWRENCE)ss.:

CASE # 07-CR-1117

I GILBERTO ESTRELLA, being duly sworn, deposes and says:

That on the 4th <sup>(TR)</sup> day of August, 2009, I placed in the U.S. Mail Depository at the Gouverneur Correctional Facility, Scotch Settlement Road, P.O. Box 480, Gouverneur, New York 13642-0370, a true and accurate copy of the enclosed papers, and mailed such to

the following: (1) Acknowledgment & Notice of Appearance  
(2) Application for Appointment of Counsel 18 USC 3006(A)9  
(3) Affidavit of Service by Mail

(1) CLERK OF THE COURT  
US Appeals Court of Appeals  
For Second Circuit  
US Court House 40 Foley Square  
New York, New York 10007

(2) US ATTORNEY'S OFFICE / HONORABLE S. MASSELY  
1 St. Andrews Place  
New York, New York 10007

Sworn to before Me this

7 Day of August, 2009

[Signature]  
Notary Public

Respectfully Submitted,

[Signature]  
GILBERTO ESTRELLA  
#07A3414  
Gouverneur Corr. Facility

T. Christopher Reed  
Notary Public, State of New York  
No. 01RE6074262  
Qualified in St. Lawrence County  
Commission Expires: 3/13/2010